IN THE SUPREME COURT OF FLORIDA

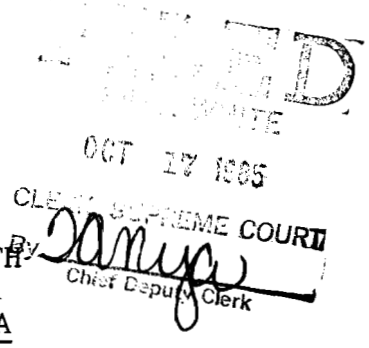
LARRY CLARK,

Appellant,

v. Case No. 67,523

STATE OF FLORIDA,

Appellee.



ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

BRIEF OF APPELLEE

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Other Authorities:

Rule 3.850, R. Crim. P.

STATEMENT OF THE CASE AND FACTS

On December 6, 1984, appellant filed a pro se motion for post-conviction relief pursuant to Rule 3.850 (R5-36). Thereafter, he filed a motion for permission to withdraw motion to vacate and set aside sentence alleging that he would be assisted by volunteer counsel Robert Sims who apparently was licensed to practice law in the State of California and Clive A. Stafford-Smith who apparently was licensed to practice law in the State of Louisiana. Clark declared that he expected a new 3.850 motion to be filed within a reasonable time (R37-40).

The state filed its response to the motion to vacate on March 20, 1985 (R41-47). On March 21, 1985 the court announced it would deny the motion (R57-58) and entered a written order on March 37, 1985 (R49-50). On April 9, 1985, Clark, through counsel Sims and Stafford-Smith filed a motion to vacate the order denying motion for post-conviction relief (R52-55). The lower court heard oral argument on the motion on May 24, 1985 (R76-89). On June 6, 1985 the lower court denied appellant's motion to vacate the order denying motion for post-conviction relief (R66). This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court did not err in denying appellant's motion to vacate order denying motion for post-conviction relief. The lower court could permissibly within his discretion refuse to permit Clark pro se to withdraw his motion to vacate when after three months no amended post-conviction motion was filed, no notice of appearance was filed by counsel and the address of the assorted new counsel was unknown.

Appellant's motion to vacate order denying motion for post-conviction relief was not a proper rehearing of the denial of the 3.850 motion since it was signed neither by the appellant nor by an attorney licensed to practice in the State of Florida. Further, this "rehearing" did not attack the correctness of the court's ruling; it merely sought to vacate the March 27 order denying relief.

ISSUES PRESENTED FOR ARGUMENT

A. WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO VACATE ORDER DENYING MOTION FOR POST-CONVICTION RELIEF.

Appellent assumes that a mistake attributable to the state (the clerk's alleged failure to forward Clark's Motion to Withdraw 3.850 and the state's failure to examine the file) resulted in the lower court's entry of the order on March 27, 1985 denying post-conviction relief and that once realized this mistake should be corrected by vacating the order denying relief and starting anew. Appellee does not share appellant's assumption.

The lower court may have been fully aware of Clark's request to withdraw the 3.850 motion in December and, after waiting some three months without receipt of any further amended pleadings, or any notice of appearance by counsel, decided that Clark was not following through on his proposal and resolution of the claims presented was appropriate. Presumably, the trial judge reviewed all that was before him and made his ruling on that basis. There is after all a presumption of regularity in state proceedings. Ford v. Strickland, 696 F.2d 804 at 811 (11 Cir. 1983).

Since the record does not demonstrate that the circuit court made a mistake, appellant's claim must fall.

Appellant further argues that the later Motion to Vacate constituted a motion for rehearing which was erroneously denied. This "rehearing" did not attack the correctness of the trial court's substantive rulings; rather it asked simply for a vacating of the March 27 order and to allow appellant to refile a 3.850 motion

(R52-55). If the lower court indeed had been aware of Clark's request to withdraw and implicitly denied it, then Clark's "rehearing" did not add any new information to the court. Moreover, appellant has not addressed the argument presented in the lower court that Clark's ostensible "rehearing" was not a proper motion since it was signed neither by appellant Clark nor by an attorney licensed in the State of Florida to practice law (R83).

B. WHETHER THE LOWER COURT ERRED IN DENYING CLARK'S PRO SE MOTION TO WITHDRAW THE MOTION FOR POST CONVICTION RELIEF.

1. Whether Mr. Clark had meaningful access to the courts.

Appellant argues that he had no meaningful access to court pro se. Appellee disagrees. Clark was able to file on December 6, 1984 his pro se motion for post-conviction relief (R5-36). In that motion he referred to the facts of his case and urged legal arguments in support of his motion. He urged the court to examine the victim's trial testimony (R10,13), referred to additional evidence which he attached (R11, 22-28), and alluded to supposed misconduct of the jury which he said was reflected in the record (R14). Appellant hardly can be characterized as facing "an insurmountable barrier to challenging his conviction." It is true that his claims are meritless but Clark can and could raise them. Further, there is nothing in the record to support the unsubstantiateds contention of Clark in his brief at Page 10 that he had no direct access to a law library or was otherwise inhibited in his research.[1/]

1/ Clark's exhibit on the Application of the Florida Bar for the Special committee on Representation of Death Sentence Inmates constitutes matters dehors the record, not considered by the

2. Whether other compelling factors required granting Clark's Motion to Withdraw.

Appellant contends that in the rules of civil procedure and under the federal rules of civil procedure, a petitioner has the right to voluntarily dismiss a complaint, at least once. However, Rule 3.850 is a rule of criminal procedure, not one of the rules of civil procedure. Furthermore, appellant is mistaken to the extent he believes that the federal rules of civil procedure automatically apply in federal habeas corpus proceedings. In Harris v. Nelson, 394 U.S. 286, 22 L.Ed.2d 281 (1969), the Supreme Court hald that Rule 33 of the Federal Rules of Civil Procedure, pertaining to discovery, was not applicable to habeas corpus proceedings.[2/]

A federal court has rejected the specific argument asserted herein by Clark. In Potts v. Zant, 638 F.2d 727 (5 Cir. Unit B 1981), a habeas petitioner urged that he had a right to withdraw his habeas petition without any procedural prejudice whatsoever. The court answered:

> [3] Potts raised a novel argument below,and before this court that as a matter of law it is inappropriate for the court

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trial court and should be stricken from this record. See Parker v. Parker, 109 So.2d 893 (Fla. 2 DCA 1959).

2/ Also in Preiser v. Rodriguez, 411 U.S. 475, 36 L.Ed.2d 439 the Court distinguished a habeas corpus proceeding from a §1983 action describing the latter as "an original plenary civil action governed by the full panoply of the Federal Rules of Civil Procedure." 411 U.S. at 496, 36 L.Ed. 2d at 454.

to apply the abuse of the writ doctrine in the context of this case. He contends that because the state had not filed any responsible pleadings at the time of his withdrawal of his first petition, he had a right voluntarily to withdraw these petitions without any procedural prejudice whatsoever. He grounds his argument on Rule II of the Rules Governing §2254 Cases (28 U.S.C.A. foll § 2254) which reads,

> The Federal Rules of Civil Procedure, to the extent that they are inconsistent with these rules, may be applied when appropriate, to petitions filed under these rules.

as well as upon Rule 41(a) of the Federal Rules of Civil Procedure, providing that a plaintiff may dismiss an action without order of the court and without prejudice by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first. As with ordinary civil plaintiffs, he maintains that as a habeas petitioner, he has a right to dismiss a habeas petition in these circumstances under Fed.R.Civ.P.41(a) without any prejudice whatsoever attaching.

If Potts' position were correct, a habeas petitioner on death row could, with no fear of adverse effects, file a first petition immediately before his scheduled execution date and then subsequently dismiss the petition after the scheduled execution date had passed, as did in fact occur here. This action could be part of a conscious strategem to delay the execution. Because we think that such action is relevant evidence as to whether or not there has been an abuse of the writ, we believe that the blind application of Fed.R.Civ.P.41(a) to the dismissal of a prior application would be inconsistent with the legal principles above set out mandating that the problem of successive applications be governed by the abuse of the writ doctrine. Accordingly, Potts' position in this regard is rejected.
(638 F.2d at 742)

If there is no automatic right to dismiss a habeas corpus petition in the federal courts, a similar result should follow in the state courts. In Roy v. Wainwright, 151 So.2d 825 (Fla. 1963) this Court acknowledged that the federal habeas corpus statute was the model for Florida's motion for post-conviction relief and that the federal precedents and authorities would be a guide to the proper application and interpretation of the Florida Rule. 151 So.2d at 828.

Rule 3.850 certainly does not preclude pro se litigation. Indeed, if Faretta v. California, 422 U.S. 806, 45 L.Ed. 2d 562 (1975) permits an accused to represent himself at trial because it is the defendant, not the lawyer, who will bear the consequences of conviction and if as this court held in Graham v. State, 372 So.2d 1363 (Fla. 1979) there is no constitutional requirement for the appointment of individual counsel for an application for post-conviction relief until a colorable or justiciable issue or meritorious greivance prima facially appears in the petition, the trial court may not be deemed to have erred in concluding that appellant's motion to vacate was so insubstantial, meritless and lacking in complexity as not to warrant the assistance of counsel and to conclude that denial of the motion was appropriate without further awaiting of the phantom amended pleading.[3/]

3/ Although appellant consistently has urged that a new amended motion to vacate would be forthcoming, none apparently has been filed since Clark's pro se motion in December of 1984.

Appellant asserts that the reasons for granting Clark's motion to withdraw were compelling but he does not specify any such compelling basis. The lower court did not abuse its discretion in denying the 3.850 motion to vacate when, contrary to Clark's representation in the motion to withdraw no new or amended 3.850 motion was filed within a reasonable time, no notice of appearance was filed by current counsel and no address listing the attorneys was mentioned in Clark's motion for permission to withdraw. The trial court was not required to keep Clark's case in legal limbo for all eternity; rather the court could permissibly choose to entertain the motion to vacate before the court and dispose of it.

C. WHETHER THE STATE OR LOWER COURT COMPLIED WITH FLORIDA LAW.

The state did not fail to comply with Florida law. Clark filed a pro se motion to vacate (R5-36) and the state served its response on Clark (R41-48). Clark did not serve the state with his Motion for Permission to Withdraw Motion to Vacate and Set Aside Sentence (R37-40) and current counsel Messrs. Sims and Stafford-Smith never entered a notice of appearance, nor are they licensed to practice law in Florida (R84,86). Even Clark's motion for permission to withdraw motion to vacate, had it been served on the state, contained no address to locate the foreign counsel (R37, 40). The state cannot be blamed for the dilatory conduct of the Clark defense team.

Appellant argues (at Brief, Page 15) that it was impossible for counsel for Clark to know how to respond to the court's denial of relief. However, he conceded below, that he had

received the state's response to the motion to vacate by April 1, 1985 (R53)[4/] and Clark's motion to withdraw represented in December - four month's earlier - that counsel was diligently reviewing the record (R37).

Finally, it was unnecessary for the lower court to serve notice of the hearing on March 21, 1985. Rule 3.850, R. Cr. P. provides inter alia that:

> ". . . if an evidentiary hearing is not required, the judge shall make appropriate disposition of the motion."
>
> . . . .
>
> "a court may entertain and determine such motion without requiring the production of the prisoner at the hearing."

In the instant case, the lower court decided that an evidentiary hearing was unnecessary.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the decision of the lower court should be affirmed.

Respectfully submitted,

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4/The state's response alluded to pertinent pages of the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Robert E. Sims, O'Melveny & Myers, 1800 M. Street, N.W., Washington, D. C. 320036 and to Clive A. Stafford-Smith, 600 Healey Building, 57 Forsyth Street, N. W., Atlanta, Georgia, 30303 on this 14th day of October, 1985.

Robert J. Lowry

Of Counsel for Appellee